

AMENDED IN SENATE JULY 1, 2014
AMENDED IN SENATE JUNE 4, 2014
AMENDED IN ASSEMBLY MAY 1, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2442

**Introduced by Assembly Member Gordon
(Principal coauthor: Assembly Member Alejo)**

February 21, 2014

An act to amend Section 13304 of the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 2442, as amended, Gordon. Porter-Cologne Water Quality Control Act: remedial action: liability.

Existing law, the Porter-Cologne Water Quality Control Act, requires a person who discharges waste into the waters of the state in violation of waste discharge requirements or other order or prohibition issued by a California regional water quality control board or the State Water Resources Control Board to clean up the waste or to abate the effects of the waste. Existing law authorizes the regional board to expend available moneys to perform any cleanup, abatement, or remedial work required under those circumstances.

This bill would prohibit the state board, *board* or a regional board, or any authorized person, as defined, *bored* from being *civilly held* liable for any damages or penalties for any act or omission of the state board, regional board, or any authorized person in furtherance of any investigation, cleanup, abatement, or other remedial work, as defined, if the state board or regional board undertakes to perform that work,

~~unless the act or omission was performed in a reckless manner in a civil proceeding for trespass or any other acts that are necessary to carry out investigations or corrective actions.~~ This bill would also prohibit the state board, regional board, or any authorized person from incurring any obligation to undertake additional investigation, cleanup, abatement, or other remedial work solely because of its decision to undertake that work. The bill would require that these provisions apply to a claim against a public entity presented on or after January 1, 2015, or, if no claim is presented, to a cause of action in a civil complaint or a writ petition filed on or after January 1, 2015. The bill would also make various technical, nonsubstantive changes.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 13304 of the Water Code is amended to
2 read:
3 13304. (a) A person who has discharged or discharges waste
4 into the waters of this state in violation of any waste discharge
5 requirement or other order or prohibition issued by a regional board
6 or the state board, or who has caused or permitted, causes or
7 permits, or threatens to cause or permit any waste to be discharged
8 or deposited where it is, or probably will be, discharged into the
9 waters of the state and creates, or threatens to create, a condition
10 of pollution or nuisance, shall, upon order of the regional board,
11 clean up the waste or abate the effects of the waste, or, in the case
12 of threatened pollution or nuisance, take other necessary remedial
13 action, including, but not limited to, overseeing cleanup and
14 abatement efforts. A cleanup and abatement order issued by the
15 state board or a regional board may require the provision of, or
16 payment for, uninterrupted replacement water service, which may
17 include wellhead treatment, to each affected public water supplier
18 or private well owner. Upon failure of a person to comply with
19 the cleanup or abatement order, the Attorney General, at the request
20 of the board, shall petition the superior court for that county for
21 the issuance of an injunction requiring the person to comply with
22 the order. In the suit, the court shall have jurisdiction to grant a
23 prohibitory or mandatory injunction, either preliminary or
24 permanent, as the facts may warrant.

1 (b) (1) The regional board may expend available moneys to
2 perform any cleanup, abatement, or remedial work required under
3 the circumstances set forth in subdivision (a), including, but not
4 limited to, supervision of cleanup and abatement activities that, in
5 its judgment, is required by the magnitude of the endeavor or the
6 urgency for prompt action to prevent substantial pollution,
7 nuisance, or injury to any waters of the state. The action may be
8 taken in default of, or in addition to, remedial work by the waste
9 discharger or other persons, and regardless of whether injunctive
10 relief is being sought.

11 (2) The regional board may perform the work itself, or with the
12 cooperation of any other governmental agency, and may use rented
13 tools or equipment, either with operators furnished or unoperated.
14 Notwithstanding any other provisions of law, the regional board
15 may enter into oral contracts for the work, and the contracts,
16 whether written or oral, may include provisions for equipment
17 rental and in addition the furnishing of labor and materials
18 necessary to accomplish the work. The contracts shall not be
19 subject to approval by the Department of General Services.

20 (3) The regional board shall be permitted reasonable access to
21 the affected property as necessary to perform any cleanup,
22 abatement, or other remedial work. The access shall be obtained
23 with the consent of the owner or possessor of the property or, if
24 the consent is withheld, with a warrant duly issued pursuant to the
25 procedure described in Title 13 (commencing with Section
26 1822.50) of Part 3 of the Code of Civil Procedure. However, in
27 the event of an emergency affecting public health or safety, the
28 regional board may enter the property without consent or the
29 issuance of a warrant.

30 (4) The regional board may contract with a water agency to
31 perform, under the direction of the regional board, investigations
32 of existing or threatened groundwater pollution or nuisance. The
33 agency's cost of performing the contracted services shall be
34 reimbursed by the regional board from the first available funds
35 obtained from cost recovery actions for the specific site. The
36 authority of a regional board to contract with a water agency is
37 limited to a water agency that draws groundwater from the affected
38 aquifer, a metropolitan water district, or a local public agency
39 responsible for water supply or water quality in a groundwater
40 basin.

(5) (A) If the state board or regional board, either directly or by contracting for services, undertakes to perform an investigation, cleanup, abatement, or other remedial work, both of the following shall apply:

~~(i) The state board, regional board, or any authorized person shall not be civilly liable for damages or penalties for any act or omission in furtherance of any investigation, cleanup, abatement, or other remedial work, unless the act or omission was performed in a reckless manner.~~

(i) Neither the state board nor a regional board shall be held liable in a civil proceeding for trespass or any other acts that are necessary to carry out investigations or corrective actions authorized by this section.

(ii) The state board, regional board, or any authorized person shall not incur any obligation to undertake additional investigation, cleanup, abatement, or other remedial work, solely as a result of having conducted the work.

(B) The following applies for purposes of this paragraph:

(i) “Authorized person” means any of the following:

(I) An employee or independent contractor of the state board or regional board.

(II) A person from whom investigation, cleanup, abatement, or other remedial work is contracted by the state board or regional board.

(III) An employee or independent contractor of a person described in subclause (I) or (II).

(ii) “Investigation, cleanup, abatement, or other remedial work” includes investigation, cleanup, abatement, or other remedial work performed pursuant to this section or Section 13267, or corrective action performed pursuant to Section 25296.10 or 25299.36 of the Health and Safety Code.

(C) It is not the intent of this paragraph to do any of the following:

(i) Impair any cause of action by the state board or regional board against any person, including, but not limited to, a cause of action for breach of contract or indemnity.

(ii) Limit the state board’s or regional board’s authority over any person.

(iii) Limit any other applicable defenses to liability or create a cause of action.

1 (c) (1) If the waste is cleaned up or the effects of the waste are
2 abated, or, in the case of threatened pollution or nuisance, other
3 necessary remedial action is taken by a governmental agency, the
4 person or persons who discharged the waste, discharges the waste,
5 or threatened to cause or permit the discharge of the waste within
6 the meaning of subdivision (a), are liable to that governmental
7 agency to the extent of the reasonable costs actually incurred in
8 cleaning up the waste, abating the effects of the waste, supervising
9 cleanup or abatement activities, or taking other remedial action.
10 The amount of the costs is recoverable in a civil action by, and
11 paid to, the governmental agency and the state board to the extent
12 of the latter's contribution to the cleanup costs from the State Water
13 Pollution Cleanup and Abatement Account or other available funds.

14 (2) The amount of the costs constitutes a lien on the affected
15 property upon service of a copy of the notice of lien on the owner
16 and upon the recordation of a notice of lien, that identifies the
17 property on which the condition was abated, the amount of the
18 lien, and the owner of record of the property, in the office of the
19 county recorder of the county in which the property is located.
20 Upon recordation, the lien has the same force, effect, and priority
21 as a judgment lien, except that it attaches only to the property
22 posted and described in the notice of lien, and shall continue for
23 10 years from the time of the recording of the notice, unless sooner
24 released or otherwise discharged. No later than 45 days after
25 receiving a notice of lien, the owner may petition the court for an
26 order releasing the property from the lien or reducing the amount
27 of the lien. In this court action, the governmental agency that
28 incurred the cleanup costs shall establish that the costs were
29 reasonable and necessary. The lien may be foreclosed by an action
30 brought by the state board on behalf of the regional board for a
31 money judgment. Moneys recovered by a judgment in favor of the
32 state board shall be deposited in the State Water Pollution Cleanup
33 and Abatement Account.

34 (d) If, despite reasonable efforts by the regional board to identify
35 the person responsible for the discharge of waste or the condition
36 of pollution or nuisance, the person is not identified at the time
37 cleanup, abatement, or remedial work is required to be performed,
38 the regional board is not required to issue an order under this
39 section.

1 (e) “Threaten,” for purposes of this section, means a condition
2 creating a substantial probability of harm, when the probability
3 and potential extent of harm make it reasonably necessary to take
4 immediate action to prevent, reduce, or mitigate damages to
5 persons, property, or natural resources.

6 (f) Replacement water provided pursuant to subdivision (a) shall
7 meet all applicable federal, state, and local drinking water
8 standards, and shall have comparable quality to that pumped by
9 the public water system or private well owner before the discharge
10 of waste.

11 (g) (1) A public water supplier or private well owner receiving
12 replacement water by reason of an order issued pursuant to
13 subdivision (a), or a person or entity who is ordered to provide
14 replacement water pursuant to subdivision (a), may request
15 nonbinding mediation of all replacement water claims.

16 (2) If requested, the public water suppliers receiving the
17 replacement water and the persons or entities ordered to provide
18 the replacement water, within 30 days of the submittal of a water
19 replacement plan, shall engage in at least one confidential
20 settlement discussion before a mutually acceptable mediator.

21 (3) Any agreement between parties regarding replacement water
22 claims resulting from participation in the nonbinding mediation
23 process shall be consistent with the requirements of any cleanup
24 and abatement order.

25 (4) A regional board or the state board is not required to
26 participate in any nonbinding mediation requested pursuant to
27 paragraph (1).

28 (5) The party or parties requesting the mediation shall pay for
29 the costs of the mediation.

30 (h) As part of a cleanup and abatement order that requires the
31 provision of replacement water, a regional board or the state board
32 shall request a water replacement plan from the discharger in cases
33 where replacement water is to be provided for more than 30 days.
34 The water replacement plan is subject to the approval of the
35 regional board or the state board before its implementation.

36 (i) A “water replacement plan” means a plan pursuant to which
37 the discharger will provide replacement water in accordance with
38 a cleanup and abatement order.

1 (j) This section does not impose any new liability for acts
2 occurring before January 1, 1981, if the acts were not in violation
3 of existing laws or regulations at the time they occurred.

4 (k) Nothing in this section limits the authority of a state agency
5 under any other law or regulation to enforce or administer any
6 cleanup or abatement activity.

7 (l) The Legislature declares that the amendments made to
8 subdivision (a) by Chapter 614 of the Statutes of 2003 do not
9 constitute a change in, but are declaratory of, existing law.

10 (m) Paragraph (5) of subdivision (b) shall apply to a claim
11 presented pursuant to Part 3 (commencing with Section 900) of
12 Division 3.6 of Title 1 of the Government Code on or after January
13 1, 2015, or, if no claim is presented pursuant to those provisions,
14 to a cause of action in a civil complaint or writ petition filed on or
15 after January 1, 2015.